No. 435.

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(No. 435.)

CHARLES L. BENEDICT,
Petitioner and Appellant,

vs.

THE UNITED STATES.

Brief and Points for Appellant.

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1899.

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The question involved in this case, is whether the Petitioner, who resigned his position as Judge of the United States for the Eastern District of New York, on the 20th day of July, 1897, shall, by reason of that resignation, lose $1,800 a year for the rest of his life, *or* receive from the United States the same compensation which had been for over twenty years paid him for his judicial services.

Before and at the time of his resignation, Judge Benedict was paid at the rate of $6,800 a year for his judicial services. Since his resignation he has been paid only $5,000 a year; and this petition was presented to the Court of Claims in order to obtain an adjudication that he is entitled to be paid the additional sum of $1,800 a year. That court dismissed the petition and the Petitioner appeals.

FIRST POINT.

The question arises under the provisions of the Statutes of the United States relating to the Courts of the United States in New York. It is a question which has never arisen before and which can only arise on the resignation of a Judge of the Eastern District of New York.

And it is purely a question of the construction of Statutes.

SECOND POINT.

The Revised Statutes of the United States, Sec. 714, provide that, "When any Judge of any Court of the United States resigns his office, after having held his commission as such at least ten years, and having attained the age of seventy years, he shall during the residue of his natural life receive the *same salary* which was by law payable to him at the time of his resignation."

The Act of February 24, 1891, 6 Stat. at L., p. 783, provides that the "salaries of the several Judges of the District Courts of the United States shall hereafter be at the rate of $5,000 per annum."

If there were no other section of the Statutes which applied to the case, the question in this case would not arise.

But the Act of February 24, 1891, is not the only Statute to be considered. Congress has passed Statutes which have a special application to the Judge of the Eastern District of New York, and it is under those Statutes that this question arises.

The provisions of those Statutes which bear upon this question are as follows:

On the 7th day of February, 1873, Congress passed an Act as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in

Congress assembled, that additional terms of the Circuit Court of the United States for the Southern District of New York shall hereafter be held in each year, commencing as follows: on the second Wednesday of January, on the second Wednesday of March, on the second Wednesday of May, on the third Wednesday of June, on the second Wednesday of October, and on the second Wednesday of December. The holding of any of the above mentioned terms shall not dispense with or affect the holding of any other term of the court at the same time, nor shall the pending of any other term of the court prevent the holding of any of the terms hereby appointed.

"Sec. 2. That the terms hereby appointed shall be devoted exclusively to the trial and disposal of the criminal cases and matters arising and pending in said court. The terms of said court appointed by this Act may be held by the Circuit Judge of the second judicial circuit and the district judges for the Southern and Eastern Districts of New York, or any one of said three judges; and at every such term held by said judge of said Eastern district he shall receive the sum of three hundred dollars, the same to be paid in the manner now prescribed by law for the payment of the expenses of another district judge while holding court in said district."

On the passage of the Revised Statutes of the United States, the provisions of that Act of February 7th, 1873, were embodied in Sections 658 and 613 of the Revised Statutes, as follows:

"Section 658. The regular terms of the Circuit Courts shall be held in each year at the times and places following. * * * In the Southern District of New York at the City of New York * * * exclusively for the trial and disposal of criminal cases and matters arising and pending in said court, on the second Wednesday in January, March and May, on the third Wednesday in June, on the second Wednesday in October and December."

"Section 613. The terms of the Circuit Court for the Southern District of New York appointed exclusively for the trial and disposal of criminal business may be held by the Circuit Judge of the Second Judicial Court and the District Judges for the Southern and Eastern Districts of New

York, or any one of *said three* judges, *and at every such term held by the said Judge of said Eastern District he shall receive the sum of* $300, *the same to be paid in the manner now prescribed by law for the payment of the expenses of another District Judge while holding court in said Dtstrict.*"

Since the passage of that Act in February, 1873, *for twenty-four years*, those terms were held by Judge Benedict who was the Judge of the Eastern District, and he received as compansation therefor the sum of $1,800, as provided by law, every year.

And the question is whether, under the 714th Section of the Revised Statutes which provides for a retiring Judge receiving "the same salary which was by law payable to him," Judge Benedict is entitled to receive not only the $5,000 provided for in the Act of 1891, but also this $1,800 provided for by Section 613 of the Revised Statutes.

In other words the question is this, "Was this $1,800, paid to Judge Benedict yearly for twenty-four years, as provided for by Section 613, a part of his *salary payable by law?*"

THIRD POINT.

What is "salary payable by law" to a Judge at the time of his resignation? There can be but one answer, it means the salary which he received for his Judicial services during the year previous to his resignation.

a It must mean that, or it must mean the salary which he would have received during the year after the date of his resignation, if he had not resigned.

b It is sufficient to show that the latter meaning cannot be the true one, if we suppose that within the year after his resignation, Congress had amended the Act of 1891, and provided that the salaries of the District Judges should be $7,000 per annum. In that case, if the Judge had not resigned, he would have received that increased

sum. But, plainly, he could not be entitled to that increased sum after his resignation. That sum would not be the salary payable by law to him *at the time of his resignation.*

c Nor can that phrase "at the time of his resignation" mean "at the instant of his resignation," or "on the day of his resignation." He might have nothing whatever payable to him on that day, but no one would think that he was therefore entitled to *nothing* thereafter.

d Hence it follows that the "salary which was by law payable to him at the time of his resignation," means the salary which became due and payable to him before. It means the salary which he actually received for the year before he resigned.

e And there is no question that Judge Benedict did receive, during the year before his resignation, as compensation for his Judicial services the sum of $6,800.

Unless therefore it can be held that there is a difference between "compensation for Judicial Services" and "Judicial Salary," it follows that the Judge's salary was $6,800, and that that is the sum which he is entitled by the Statute to receive every year "during the residue of his natural life."

FOURTH POINT.

The payment of that $1,800 a year to the Judge for twenty-four years has been the payment of a sum "payable by law," by express Statute.

If therefore it is included in the term "salary," it is included in the phrase, "Salary payable by law at the time of his resignation."

And here I beg leave to ask, if the sum, thus paid to the Judge every year, was not "salary," *what was it?*

I maintain that under the reason of the law, the word "salary" should include this compensation for Judicial service; that no definition of the word can be found which will exclude it; and that Congress has put an interpretation on the word, which necessarily *includes it.*

FIFTH POINT.

The proper rule of Construction of this Statute was declared by the Attorney General of the United States in 21 Op. of Atty. Gen., p. 450, as follows:

"The objects of this Statute are not such as sometimes lead to *a strictness of construction which makes the turn of every phrase a justification for reluctance to believe that a meaning was intended, which has not been clearly and unequivocally expressed.* On the contrary, there is no reason why this statute should not be fairly construed, reading its terms in the light of the manifest object and purpose of Congress.

The object was to further the good of the public service by providing for the retirement, at full pay, of judges who have reached the age of seventy and been ten years on the bench. The expression 'any judge of any court of the United States' was certainly intended to have the widest application; although, if the meaning of this section is to turn on forms of expression, it would not apply to the Chief Justice of the Court of Claims at all, because by the act creating the court (Rev. Stat., sec. 1049), 'It shall consist of a chief justice and four judges,' etc. All five of these officers are appointed by the President, confirmed by the Senate, hold their offices during good behavior, take the same oath, have the same jurisdiction, and receive the same salary payable in the same way. It is not open to doubt that the retirement Act was intended to apply to the chief justice as well as to the judges of that court.

I understand that the doubt which led to your question has been suggested by the phrase 'after

having held his commission as such at least ten years.' This, it has been thought, may mean that the commission, under which the judge is serving at the time of his retirement, must have been in force at least ten years. Certainly no such intention is to be extracted from this language without resort to the same technicality which would deny to the chief justice of the Court of Claims the right under this section which the other judges of that court have. The simplest form of expression, and therefore perhaps the most natural, would have been 'resigns after having served at least ten years.' But it is a matter of common knowledge that the object of this statute was not only to offer an additional inducement to enter the judicial service of the United States, but also *to encourage the retirement therefrom of men whom age or infirmity make incapable of further service, some of whom, at the time of the passage of the Act had already been for a considerable time wholly disabled.* If the form of expression I have above suggested had been used, it might have been claimed that actual service for ten years was required, so that the period of past incapacity would be excluded. It was, in my opinion, to avoid this result that the reference to holding the commission was made instead of reference to holding the office or discharging its duties. This intention seems to me clearly to account for the language used, and at the same time to exclude the idea that any significance was meant to be given to the formal written expression of authority which might, for the time being, be evidence of official character. I am wholly unable to conceive any reason which could have led Congress to a consideration of this feature of the subject, especially with respect to judgeships which are exactly alike in every particular except in name. It was being in commission and not holding a particular commission that Congress meant to make a condition."

The principle laid down by Judge Story in United States *v.* Morse (3 Story's Rep., 87), "Where the words of the Statute are loose or obscure and admit of two interpretations, it seems to me that the construction ought to be favorable to the claims of the officer who performs the duties of two independent offices," is also clearly applicable. Judge Benedict

had performed for twenty-four years the duties of a Judge of the Circuit Court in the Southern District, as well as those of District Judge in the Eastern District.

If it is possible to give two constructions to this word "salary" in Section 713, *one* of which shall cause the Judge after his resignation to receive less than he has been receiving for the last twenty-four years, and the *other* of which shall cause him to receive the same that he has been receiving, the latter construction, which is a construction "in favor of the officer," should be adopted.

The construction of the word "salary" in the Statute, so as to include this $1,800, which Judge Benedict for twenty-four years received annually as compensation for his services as Judge of the Circuit Court in the Southern District, is in conformity with the object of the Act. A construction which would exclude it, is contrary to the object of the Act.

Manifestly the object of the Act was that a Judge, who was about to retire after ten years' service, should not have to consider the question of a diminution of his income by his resignation. The intention was that he should receive from the public, after his resignation the same amount yearly, which the public had previously paid him for his Judicial services.

But, unless this $1,800 is to be held to be "salary," Judge Benedict will receive from the public after his resignation $1,800 a year less than the public had paid him for his Judicial services during the twenty-four years before his resignation.

SIXTH POINT.

The definitions that have been given to the term "salary" by the law dictionaries and the decisions of the courts do not require the exclusion from its meaning of this Judicial compensation.

(*a*) Dictionary definitions are as follows:

Bonvier: "A reward or recompense for services performed."

Abbott: "A recompense or consideration made to a person for his pains and industry in another person's business."

Jacobs: The same.

Rapelye & Lawrence: The same.

Stroud: The same.

Wharton: The same.

Webster: "The recompense or consideration stipulated to be paid to a person for services."

Worcester: The same.

The Century: "The recompense or consideration stipulated to be paid to a person, periodically for services."

It could hardly be said that this $1,800 a year was not a *recompense paid to Judge Benedict for Judicial services*. And if so it was "salary." And it was payable to him by law, and hence within not only the spirit but the letter of R. S. § 714.

(*b*) The meaning of the word "salary," has come before some of the State courts for consideration. I comment upon them to show that, even if State Court decisions as to State Statutes were of any authority on this case, these decisions are not against my view.

In Thompson *v.* Phillips, 12 Ohio State Rep., 617, the decision was that, under a section of the Ohio Constitution in which the words "salary" and "compensation" were *both* used, there was a difference in the meaning of the words, as used in that section. But in the Constitution and Statutes of the United States those words are used indiscriminately. The decision in Thompson *v.* Phillips

therefore has no bearing. And even in that decision the "general sense" of the word "salary" is spoken of as "embracing any compensation fixed for an officer"; and this covers the compensation in question.

In Dane *v.* Smith (54 Ala., 49) the language used is "compensation established by law to be paid at stated times."

These payments to Judge Benedict were "established by law"; were "decreed by authority" and were "paid at stated times," according to express Statute.

The State *v.* Murphy, 24 Fla., 33, quotes with approval the definition of "salary" from Bouvier's Law Dictionary as being "A reward or recompense for services performed" (which is the definition that we claim), and holds that the clause of a Florida Statute which said that a County Solicitor "shall be paid Three Dollars *per diem*," gives him a "stated salary." If Three Dollars *per diem* is a Stated Salary, why is not Three hundred dollars a month six times a year a stated salary?

In the decision of Cowden *v.* Huff, 10 Ind., 85, it is said, that, "salaries are the *per annum* compensations to men in official and some other situations." The opinion adds, "See the dictionaries of Richardson, Webster, Bouvier and Wharton," and gives no other authority.

Not one of those dictionaries embodies in its definition any *per annum* idea. I have given two of them and several others above.

Webster's Dictionary embodies in one of its definitions the idea of a periodical payment, but it does not say "annual payment." And Richardson's definition is as follows: "Pay made for services done in stated times or periods of time." He makes not the payment but the service periodical.

Not one of the authorities referred to by the Court supports the definition of a "*per annum* compensation."

(*c*) What distinguishes salary from wages is the official character of the recipient. As it is said in Ely's Political Economy (p. 169), "Labor is remunerated by wages and by salaries, wages being the remuneration of subordinates and salaries of officials."

This latter has come to be a more generally held meaning, viz: that when men speak of "salary" they mean the remuneration for official service. But even this is not a universal use. When Hamlet speaks of killing the slayer of his father while in prayer and thus sending him to heaven, and says "Why! This is hire and *salary*, not revenge!" he did not have any idea of *official* service or of *annual* employment or of time at all.

In the case of Comm. *v.* Butler (99 Penn. State Rep., 542), Judge Sharswood said "According to most approved lexicographers the words 'salary' and 'wages' are synonymous. They both mean the same thing, a sum of money periodically paid for services rendered" * * "If there is any difference between them it is only in the application of them to more or less honorable services. * * "How can it make any difference in which way the compensation is ascertained." And the Court in that case held that a *per diem* compensation was salary.

The opinion of the Court of Claims (Record, fol. 9) uses this language: "The important element of salary is certainty of amount in relation to duration of time." But, as will be seen, this element is not included in any of the definitions of the word which have been given as above by either the dictionaries or the Courts. That this was the *important element* does not seem to have been discovered before the opinion below was rendered. But, if that is an element, important or not, it is not lacking in this case. Judge Benedict was paid three hundred dollars a month for six months of every year for 24 years. And that mode of payment has been declared to make the compensation "salary" by Statutes of the United States as we will proceed to show.

SEVENTH POINT.

The question whether this $1,800 is "salary" under Sec. 714 of the Revised Statutes is not to be determined or affected by decisions of the Courts of a State as to the meaning of the word, where it has been used in the Statutes of that State.

It is to be determined by the Constitution and Statutes of the *United States*. The construction which the Legislative Power of the United States has given to the word should control.

(*a*) The Constitution and the Statutes of the United States use different words to express recompense for Judicial services.

The Constitution uses the word "compensation."

Art. 3, Sec. 1, says "The Judges * * * shall at stated times receive for their services a *compensation*."

"Compensation" for their services is the same as "a recompense for judicial service."

The Statutes of the United States use both the word "compensation" and the word "salary," and they use them indiscriminately. Thus, the Act of September 23, 1889, 1 Stat. at L., p. 72, provided that "There shall be allowed to the Judges of the Circuit Court and other courts of the United States the yearly "*compensation* hereinafter mentioned." Section 554 of the Revised Statutes provided that, "District Judges are entitled to receive yearly *salaries* at the following rates."

In Section 35 of the Revised Statutes the word used is "salary," and in Section 28 the word used is "compensation," as to the amount paid to Representatives. And so in Section 35, the recompense of a Senator is spoken of as "salary," while in Section 45, the same thing is spoken of as "compensation." The same use of the two words occurs in Sections 39 and 41, and in Sections 49 and 51.

The same thing runs through all the Statutes. Thus, in the Appropriation Act of February, 1897, (29 Stats., p. 538) the appropriations are made for "compensation" for officers, who by Statute are

declared to be recompensed by "salary;" as well for pages who are paid by the day "for the time they are actually employed," as for the officers whose salary is paid "annually."

And, furthermore, in the Act creating the Eastern District of New York (13 Stat. at L., p. 428) the only provision with reference to the Judge of that District is that, "The said Judge shall also receive the same *compensation* that is by law provided for the Judge of said Southern District."

(*b*) It is to be noted that neither the word "compensation," nor the word "salary" is used in Section 613 of the Revised Statutes, the wording of that Section being, "At every such term of the Circuit Court the Judge shall *receive the sum* of $300." But surely no one can contend that this form of words expresses any other idea than was expressed by the words "compensation" and "salary," wherever they have been used in the Statutes. The idea intended to be expressed in every case is "recompense paid to a Judge for judicial services."

Let us suppose that Section 613 had read that "at every such term of the Circuit Court the Judge shall receive the *salary* of $300;" or let us suppose that it read "at every such term the Judge shall receive the *compensation* of $300;" instead of reading, as it now does, "at every such term he shall receive *the sum of* $300." All these three forms of expression convey the same idea; namely, recompense for judicial services. And it would be a very strained construction of Section 714 which should hold that the word "salary" in that Section would include what was specified in the first expression, but did not include what was intended in the third form of expression, although conveying exactly the same idea.

EIGHTH POINT.

The opinion of the Court below seems to be that because the amount of this yearly compensation to Judge Benedict for his services as Judge of the Circuit Court in the Southern District was fixed at $300 for each term, not exceeding six, that he should hold in the year, therefore it was not "salary."

But the word "salary" is used in the Statutes of the United States to cover exactly such cases. Thus, in Sections 52 and 53 of the Revised Statutes, the compensation paid to the pages for the Senate and the pages of the House of Representatives is provided for. And it is provided that they shall receive "a *salary* of $3.45 a day each *while actually employed.*" There is no distinction in principle between the payment to these pages of so much a day "while actually employed," and the payment to the Judge of the Eastern District of $300 a month "at every term held by him." The one case is exactly as indefinite as the other. But the compensation to the pages for the services rendered by them *is specifically described in those Sections as "salary," notwithstanding such indefiniteness.* These Sections constitute a Statutory construction of the word "salary," which is a complete answer to the view of the Court of Claims.

The pages might be employed for one day or for three hundred days. How many days they would have to be paid for during the year could not be told till the year was ended. If a page served ten days he would be entitled to so much pay. If he served but five and declined to serve more, he would be entitled to only half as much. But in either case the Statute provided that the recompense to be paid him for his services as page, whatever such services had actually been, was "salary."

Here is a Statutory construction of the word "salary." holding that the recompense to a page, at so much a day, for so many days as he shall be actually employed, is "salary." It follows that

the recompense to a Judge of three hundred dollars at every term held by him is also "salary."

"A salary of $3.45 a day while actually employed." "The sum of $300 at each term held by him." The page's recompense for his services is declared to be "salary." Then the Judge's recompense for his services must also be "salary."

NINTH POINT.

What is the "salary" of a Judge? Manifestly it is the compensation which the public pays to him for his Judicial services rendered to the public. It makes no difference how that money is paid, whether daily, weekly, monthly or yearly. The page who receives $3.45 a day "while actually employed," as specified in Sections 52 and 53 of the Revised Statutes, receives a *salary*, just as much as the clerks, messengers and laborers mentioned in the same sections, who are paid so much a year. To make the meaning of the word "salary" dependent on the mode of payment, would be sacrificing the essential to the form.

Recompense for judicial services is the essential element, and that $1,800 a year has just as much been a recompense paid by the public to Judge Benedict for his judicial services as Judge of the Circuit Court in the Southern District, as has been the $5,000 paid him for his judicial services as Judge of the Eastern District.

TENTH POINT.

The sixth paragraph of the Findings of Fact (Record, fol. 7), is entirely immaterial on the question in this case.

The question whether the Eighteen hundred Dollars which, as stated in the Fifth paragraph was "thus paid annually to the claimant" is properly called "salary" or not, is not in the slightest degree affected by the facts that such payments were made by the Marshal, or were allowed in the Marshal's accounts, or were paid to the Marshal out of the apropriations for defraying the expenses of the Courts of the United States.

(*a.*) The question whether a compensation is, or is not "salary" cannot be affected by the mode of its payment. Congress might change the mode of payment to the Judges of the United States as it pleased—it might order that they should be paid by the Treasury Department or the Department of Justice, by the Marshal or the District Attorney—that they should be paid yearly of monthly or daily, and it would make no difference. The compensation which the Judges received would still be a "salary," and nothing else

(*b.*) Nor can this question be in any way affected by any regulation as to how the disbursing officer shall be repaid, or settle his accounts with the Treasury Department.

(*c.*) Nor can it be affected by considering the Appropriation, against which such payment was charged by the Treasury Department. The character of what Judge Benedict received, whether "salary" or something else, is the same, whatever Appropriation Bill Congress thought fit to use, provide the money for it.

It cannot be argued that this compensation was not "salary" because it was paid out of an appropriation "for the expenses of the United States Courts;" for the reason that the salary of the Judge

and the salaries of the other court officials form part of the expenses of the Court. And they are oftentimes so specifically described in the Statutes.

For instance, in the Appropriation Bill of 1878, for the "Legislative, Executive and Judicial Expenses of the Government." (19 Stat. at Large, p. 318) there is a specific appropriation "for defraying the contingent *expenses* of the Courts *including the compensation of the District Attorney.*"

And in the Sundry Civil Bill of the same year (id p. 346) there is a specific appropriation "for salaries and *other* necessary *expenses* of the Metropolitan Police."

In the Sundry Civil Bill of 1892 (22 Stat. at L. 335-6) there are specified as "*expenses* of the United States Courts" the payment of District Attorneys and assistants and the *salaries* of the United States District Judge, District Attorney and Marshall of the Northern District of Iowa.

Many other citations might be made, but these are abundant to show that the payment of this money to Judge Benedict out of an Appropriation for the expenses of the United States Courts does not tend to show that it was not "salary." Salaries are a part of such expenses.

The Sixth Paragraph of the Statement of Facts is, therefore, immaterial.

ELEVENTH POINT.

If it were suggested that this compensation should not be held to be salary because if it were, it could not be diminished or taken away under Section 613 of the Revised Statutes, I beg leave to call attention to the following opinion rendered by Judge Blatchford on this very question, in answer to a letter addressed to him on the matter by Judge Benedict, the original of which is in my possession.

WASHINGTON, March 10, 1884.

My Dear Judge:

It seems to me that as long as Sec. 613 is in force permitting the Criminal Term to be held by you, your right to the $300 cannot be taken away. It is "compensation" under Art. 3, Sec. 1, for "services" and is not "expenses."

Yours faithfully,

SAML. BLATCHFORD.

Judge Benedict.

This opinion of Judge Blatchford is strongly supported by the case of U. S. *v.* More, 3 Cranch, 159. —Note.

The Justices of the Peace in the District of Columbia were compensated by fees. Congress passed a law abolishing the fees. Held by Cranch, *J.*, that the fees were the compensation fixed by law and that by reason of the 3d Article of the Constitution, a law abolishing those fees could not affect the Justice during his continuance in office. And Judge Marshall concurred.

TWELFTH POINT.

To sum up the matter:

1. There is no reason in equity why this sum of $1,800, which had been paid to Juge Benedict every year for twenty-four years, as a recompense for Judicial services, should be held to have been not "salary," and should, therefore, stop on his resignation.

The continuing of the salary on the retirement of a Judge only makes up in a very small measure for the great inadequacy of the compensation for which the Judges of the United States render their services. Judge Benedict has given to the United States his Judicial services for a period of thirty-three years. In no one of those years has he received as compensation half of what he would have received for services at the bar. He has given to the United States services for which the community would

have readily paid him $150,000 more than he has received from the United States. If it was "just" that he should receive this addition to his salary for extra work which he performed, while he performed it, it is equally just, that, when the Statute says that he shall receive "the same salary" after his resignation during his natural life, that salary should not on his resignation be cut down from $6,800 to $5,000.

No equitable ground can be made for making a distinction between the salary which he received for one part of his Statutory work and that which he received for another part of it.

Even at the best, his remuneration for his long service rendered to the United States will be entirely inadequate.

If there were any doubt as to the proper construction of Sec. 714, that construction should be given which would not reduce the small compensation of a public servant, who has rendered to the public thirty-three years of faithful Judicial service.

(2.) There is nothing in any definition that has been given to the word "salary" by the dictionaries or the courts, which requires that this compensation for judicial service rendered by Judge Benedict should be held not to be "salary."

(3.) Congress has expressly applied the term "salary" to compensations of exactly the same character.

(4.) And unless the Court can think that Congress, in passing Sec. 714 of the Revised Statutes, did not intend that every Judge of the United States who should resign after ten years' service, should thereafter receive during his life the same amount annually which he was, at the time of his resignation receiving as compensation for his judicial services, the decision of the Court of Claims should be reversed and a decree rendered in favor of the petitioner.

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